



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Webb Electric Co. of Florida, Inc.

File: B-225459

Date: November 7, 1986

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### DIGEST

1. Protest is dismissed as untimely when not filed with General Accounting Office within 10 days of notification of initial adverse action on prior agency-level protest.
2. Award to low bidder does not appear legally objectionable where protester did not timely perfect its oral size status protest.

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### DECISION

Webb Electric Co. of Florida, Inc. (Webb), protests the award of a contract for electrical repairs to Western Alaska Contractors by the Army Engineer District, Alaska, under invitation for bids (IFB) No. DACA85-86-B-0019.

This is a protest by the fourth low bidder who claims the bids of the three lower bidders should be rejected because none of those firms is a small business concern eligible for award under this small business set-aside. The protester does not ask us to determine whether the three lower bidders are small business concerns, a determination which it recognizes properly is for the Small Business Administration (SBA) and not our Office. The protester does maintain, however, that the contracting agency improperly proceeded with award even though it was in receipt of a timely size status protest by Webb.

Enclosed with Webb's protest are copies of pertinent documents including correspondence between it and the contracting activity. Accepting the facts as presented by the protester, it is clear that the protest is untimely. We dismiss the protest. 4 C.F.R. § 21.2(a)(3) (1986).

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According to Webb, bids under the IFB were opened on August 28, 1986, and the four low bidders, in ascending order of price, were Western Alaska Contractors, Seco, Shemya Construction and Webb. On September 5, 1986--the fifth business day after bid opening--Webb sent a Western Union message to the Army's contracting officer, in which Webb briefly outlined alleged affiliations of each of the three lower bidders, and concluded:

"In light of the apparent multiple affiliations of the first, second and third low bidders we hereby protest the low three bidders and request they furnish verifications of their small business status . . . prior to an award being made for subject contract."

That same day, Western Union telephoned the contracting activity and orally conveyed Webb's message. The contracting activity dispatched a runner to the Western Union office to pick up a copy of the telegram; on arrival, the runner was told by Western Union that the message already had been placed in the mail. (In later correspondence with the protester, the Corps of Engineers advised that it never received a copy of the mailgram from Western Union).

Webb states that on September 19, it received from the Army a letter dated September 15 advising that award had been made to Western Alaska. By letter of September 25 to the contracting activity, Webb referred to its size status protest and objected to the award and performance of the contract absent a size status determination by the SBA. The Army replied by letter of September 30, in which it advised Webb that:

". . . To date, we have not received the [written copy of] the protest."

"No further word was received, and as it is the responsibility of the contractor to ensure that written notification is received no later than five work days after bid opening your protest was deemed invalid, and award was made on September 15, 1986."

Upon receipt of this letter on October 3, Webb forwarded to the Army a confirmation copy of its original size status

protest message and advice from Western Union to the effect that its oral transmission of the message was followed up by mailgram.

By letter of October 16, received by Webb on October 21, the Army repeated its earlier account of events but stated that since it now was in possession of a written copy of Webb's size status protest, it would "proceed with a request to [SBA] for a size determination." The Army concluded, however:

"As it is the responsibility of the contractor to ensure delivery within the time allowed, your request to ask the [SBA] for a size determination prior to award was properly denied. The size determination which [SBA] issues will be used for future contracts."

Webb filed its protest with our Office on November 4.

The threshold question with which we are presented is whether Webb's protest to our Office is timely. We conclude that it is not. The basis of Webb's protest is that the Army proceeded with the award of the contract without forwarding Webb's timely size status protest to SBA for determination. Webb received notice of the award on September 19. Its letter of September 25, received by the Army prior to September 30, clearly was an agency-level protest of an award which Webb ". . . consider[ed] . . . to be a violation of referenced procurement practices." Since it was filed within 10 days of when Webb became aware of its basis for protest, the agency-level protest was timely. 4 C.F.R. § 21.2(a)(2).

Webb was obligated to file any subsequent protest with our Office within 10 days of formal notification of or actual or constructive knowledge of initial adverse action on its agency-level protest. 4 C.F.R. § 21.2(a)(3). This occurred on October 3, when Webb received the Army's September 30 letter in which Webb was advised that the Army considered its size status protest "invalid" because no written confirmation of the oral protest had been received. Nothing in this letter suggests that the Army would reexamine the award, suspend performance of the contract, refer the question of Western Alaska's size status to SBA, or take any other action to change the situation to which Webb had objected. Webb's subsequent protest to our Office, therefore, should have been filed within 10 days of its receipt of this initial agency

action adverse to its position, that is, no later than October 20. Its protest filed with us on November 4 is therefore untimely.

Webb points to the fact that it was not until a later exchange of correspondence with the Army which concluded less than 10 days before its protest was filed with us that Webb was expressly advised that a size status determination only applicable to future procurements would be requested of SBA. The protester seems to suggest that not before then was it on notice that the Army was not disposed to disturb the award which it had made. The initial adverse agency action, however, had occurred some weeks earlier when the Army advised Webb its size status protest was "invalid" for lack of timely written confirmation.

In any event, Webb's protest is without merit. The protester argues that under the SBA's regulations and parallel provisions of the Federal Acquisition Regulation (FAR), a small business size status protest is timely, and affects a specific solicitation, "if the size protest is made by telephone within [5 work days] after the bid opening and a confirming written protest is sent out within that same period." (Emphasis in original.)

The regulations, however, do not use the phrase "sent out." More precisely, FAR, 48 C.F.R. § 19.302(c) & (d) (1985) provides:

"(c). . . .

(2) The protest, or confirmation if the protest was initiated orally, shall be in writing. . . .

(d) In order to affect a specific solicitation, a protest must be timely. . . .

(1) To be timely, a protest by any concern or other interested party must be received by the contracting officer (see (i) and (iii) below) by the close of business of the 5th business day after bid opening (in sealed bid acquisitions)

. . . .

(i) A protest may be made orally if it is confirmed in writing either within the 5-day period or by letter postmarked no later than 1 day after the oral protest.

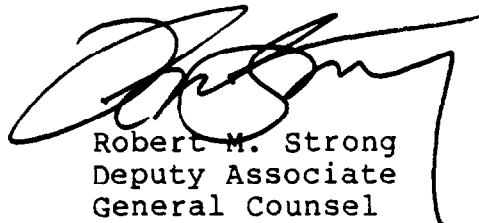
(ii) A protest may be made in writing if

it is delivered by hand, telegram, or letter postmarked within the 5-day period."

In its regulations, SBA states:

" . . . a protest shall be considered timely if made by telephone to the contracting officer within the 5-day period allotted and the contracting officer thereafter receives a confirming letter (1) within such 5-day period or (2) postmarked no later than one day after the date of such telephone protest. . . ." 13 C.F.R. § 121.9(a) (1986).

It is undisputed that no written size status protest was delivered to the contracting officer within the 5-day period. Although Webb itself did not file an oral or telephonic size status protest with the contracting officer within the 5-day period, we think it is reasonable to regard Western Union, as Webb's agent, as having done so. No written confirmation, however, was received by the contracting officer within the 5-day period. Nor--and this is the crux of Webb's protest--did the contracting officer ever receive a confirming "letter" "postmarked" within 1 day of the oral or telephonic protest. Although Western Union claims to have sent a confirming mailgram, the agency has denied ever having received it. The contracting officer first received a "confirmation copy" of the mailgram from the protester some time after October 3--more than a month after bids were opened and almost a month after the telephonic protest. Since the protester did not perfect its size status protest within the time permitted by the regulations, the Corps' award of the contract on September 15 does not appear legally objectionable.

  
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